

REPORT DOCUMENTATION PAGEForm Approved
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. **PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.**

1. REPORT DATE (DD-MM-YYYY)

23-04-2008

2. REPORT TYPE

FINAL

3. DATES COVERED (From - To)**4. TITLE AND SUBTITLE****Control of Private Security Contractors by the Joint Force Commander****5a. CONTRACT NUMBER****5b. GRANT NUMBER****5c. PROGRAM ELEMENT NUMBER****6. AUTHOR(S)**

LCDR Charles W. Brown, IV, USN

Paper Advisor (if Any): LTC Michael L. Kramer, USA

5d. PROJECT NUMBER**5e. TASK NUMBER****5f. WORK UNIT NUMBER****7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)**Joint Military Operations Department
Naval War College
686 Cushing Road
Newport, RI 02841-1207**8. PERFORMING ORGANIZATION REPORT NUMBER****9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)****10. SPONSOR/MONITOR'S ACRONYM(S)****11. SPONSOR/MONITOR'S REPORT NUMBER(S)****12. DISTRIBUTION / AVAILABILITY STATEMENT**

Distribution Statement A: Approved for public release; Distribution is unlimited.

13. SUPPLEMENTARY NOTES A paper submitted to the Naval War College faculty in partial satisfaction of the requirements of the Joint Military Operations Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.

14. ABSTRACT

The events of 16 September 2007, the Blackwater shooting in Nisoor Square, brought Private Security Contractors (PSC) and their use under an intense focus. The problems highlighted for the Joint Force Commander (JFC) were his lack of necessary tools to exercise oversight and control of operational contractors and an inability to hold them accountable. Steps have been taken since the incident to improve the JFC's arsenal within this area. The purpose of this paper is to provide an analysis of the tools the JFC can utilize to ensure control is maintained of civilians accompanying military forces during a declared war or contingency operation. Additionally, it will examine the benefits of aligning PSC usage in the joint operating area (JOA) under the Department of Defense (DoD) to both establish a solid legal jurisdiction and remove the friction from operations under multiple departments.

15. SUBJECT TERMS

Private Security Contractor, Blackwater, Iraq, Uniform Code of Military Justice, jurisdiction, Department of State, Department of Defense

16. SECURITY CLASSIFICATION OF:**17. LIMITATION OF ABSTRACT****18. NUMBER OF PAGES****19a. NAME OF RESPONSIBLE PERSON**
Chairman, JMO Dept**a. REPORT**

UNCLASSIFIED

b. ABSTRACT

UNCLASSIFIED

c. THIS PAGE

UNCLASSIFIED

24

19b. TELEPHONE NUMBER (include area code)

401-841-3556

Standard Form 298 (Rev. 8-98)

**NAVAL WAR COLLEGE
Newport, R.I.**

Control of Private Security Contractors by the Joint Force Commander

by

Charles W. Brown, IV

LCDR U.S. Navy

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

23 April 2008

Table of Contents

Introduction	1
Historical Use	2
Discussion and Analysis	3
Recommendations	9
Concluding Remarks	15
Notes	17
Bibliography	20

Abstract

Control of Private Security Contractors by the Joint Force Commander

The events of 16 September 2007, the Blackwater shooting in Nisoor Square, brought Private Security Contractors (PSC) and their use under an intense focus. The problems highlighted for the Joint Force Commander (JFC) were his lack of necessary tools to exercise oversight and control of operational contractors and an inability to hold them accountable. Steps have been taken since the incident to improve the JFC's arsenal within this area. The purpose of this paper is to provide an analysis of the tools the JFC can utilize to ensure control is maintained of civilians accompanying military forces during a declared war or contingency operation. Additionally, it will examine the benefits of aligning PSC usage in the joint operating area (JOA) under the Department of Defense (DoD) to both establish a solid legal jurisdiction and remove the friction from operations under multiple departments.

INTRODUCTION

Just before noon on 16 September 2007, a vehicle borne improvised explosive device detonated approximately 25 yards from the Izdihar financial compound. According to a U.S. embassy report, two Blackwater convoys escorted their principal who had been inside the compound back to the safer confines of the Baghdad Green Zone.¹ A third Blackwater tactical support team (TST), number 23, was dispatched from the Green Zone to assist after the bomb was reported. After arriving at Nisoor square, TST 23 allegedly came under “small arms fire” from “multiple nearby directions.”² The team was able to depart the scene; however, another TST sent to aide TST 23 further faced a standoff at Nisoor square between themselves and an Iraqi quick reaction force (QRF). A U.S. Army QRF responded to the site, mediated the standoff and escorted the TST out of the area. Multiple accounts would later indicate 17 Iraqis were dead with no injuries to Blackwater or Army personnel.

The Nisoor Square incident brought Private Security Contractors (PSC) and their use under an intense focus. In this case the PSCs involved were Department of State (DoS) contractors. The problems highlighted for the Joint Force Commander (JFC) were his lack of necessary tools to exercise oversight and control of operational contractors and an inability to hold them accountable. Steps have been taken since the incident to improve the JFC’s arsenal within this area. The purpose of this paper is to provide an analysis of the tools the JFC can utilize to ensure control is maintained of civilians accompanying military forces during a declared war or contingency operation. Additionally, it will examine the benefits of aligning PSC usage in the joint operating area (JOA) under the Department of Defense (DoD) to both establish a solid legal jurisdiction and remove the friction from operations under multiple departments.

HISTORICAL USE

Private contractor usage can be traced back to antiquity and for the United States their presence has been constant since our battle for independence. The American Revolution saw private contractors performing engineering, armament manufacture and even more kinetic actions with private ships licensed to carry out warfare.³ The exponential increase in their usage did not start to occur until the end of the Cold War and its “peace dividend.” From 1985 to 1999 the U.S. Army saw a decrease of 40 percent in personnel down to 480,000; at the same time other services were declining an average of 30 percent.⁴ This departure of military skilled individuals created a pool of talent for a growing private contractor industry.

During the Cold War, the Soviet Union and the United States found reason to involve themselves in potential trouble areas to advance their interests against each other. With the cessation of the looming bi-polar threat, previously submerged conflicts rose to the forefront; however Russia and the United States had less desire to engage. The vacuum created by loss of a referee country or intergovernmental organization (IGO) fueled the demand for commercially driven security companies.⁵

The result of this combination of effects can be seen when comparing military to contractor ratios. During the 1991 Gulf War the ratio was estimated at 50 to 1; OPERATION IRAQI FREEDOM saw an increase to 10 to 1 in 2003.⁶ As stability and reconstruction efforts have continued in both Afghanistan and Iraq, contractor use has followed suit. U.S. Central Command (CENTCOM) reported over 196,000 contractor personnel working for the DoD in its region at the end of FY 2007 bringing the ratio in Iraq closer to 1 to 1.⁷

DISCUSSION AND ANALYSIS

PSC's are a smaller percentage of the total contracting force but accounting for and classifying who they are is problematic. Different estimates place the total of armed security contractors anywhere from 25 to 35 thousand.⁸ Adding confusion to the numbers is the official or unofficial contracting status of companies, tiers of sub-contracting and the temporary nature of some assignments. As this increase has continued, the commander's ability to command and control these entities has come increasingly into the limelight. Joint Publication 1-02 defines control as, "Authority that may be less than full command exercised by a commander over part of the activities of subordinate or other organizations."⁹ PSCs operate solely under a contractual obligation; however the lines of the JFC's ability to exercise control over these civilians, especially in the legal sense, have been altered considerably. The question for the JFC is, amongst the confusion what accountability resources are at his disposal, specifically for the PSC?

Three areas of legal coverage apply: host nation (HN), U.S. Federal and the Uniform Code of Military Justice (UCMJ). There are international jurisdictions, however the complexities involved are beyond the focus of this paper and are unlikely to simplify until more countries develop a more standardized approach to PSCs.¹⁰ A law also requires practicality and political will to be enforced. A law's existence alone is not necessarily enough to allow its use by the JFC.¹¹ As well, especially with host nation legalities, there could be a lack of fidelity within their judicial system or a desire to avoid certain legal statutes. The type of jurisdiction applied to a scenario of wrongdoing will depend on the characteristics of the event as well as prearranged agreements.

HN laws are the default jurisdiction where the criminal event occurred. A DoD contractor accompanying the force is subject to the country's law unless there is a negotiation between the two countries or an existing status of forces agreement (SOFA). This also assumes that contract personnel are part of the SOFA.¹² Yet, the host nation may choose, for whatever reason, not to pursue prosecution. A U.S. on U.S. or U.S. on third country national (TCN) crime may not carry the same value to the HN as it does the JFC. Moreover, in the environment a JFC can expect to operate, it is likely the HN will have lost some or all of its capability to effectively prosecute a criminal case. Likewise, a judicial system may not exist due to a post-war condition. Despite HN jurisdiction being the initial option for consideration in more stable conditions, it is unlikely the JFC can expect its application.

Federal laws start with special maritime and territorial jurisdiction (SMTJ), title 18 USC § 7(9), expanded by the 2001 Patriot Act to include such areas as U.S. facilities overseas as well as U.S. ships or aircraft. If the crime occurs within this expanded definition it is essentially the same as if it occurred on U.S. soil. More importantly, it applies to any crime committed by or against a U.S. national. This provides the JFC via federal jurisdiction, an ability to hold accountable non-DoD contract personnel, but only in certain territory. To date only one prosecution of a contractor under SMTJ has occurred; the case involved a CIA contractor in Afghanistan. Operating out of forward operating base Asadabad, David Passaro interrogated a prisoner, Abdul Wali, for two days, who later died. He was eventually convicted on one count of assault resulting in serious bodily injury and three counts of misdemeanor assault resulting in a sentence of eight years and four months.¹³ Here federal jurisdiction was applied to a forward operating base and one could see connecting jurisdiction over misconduct of non-DoD contractors at similarly held territory

where contingency operations are taking place. The difficulties faced, when attempting to apply this jurisdiction to a scenario such as the Abu Ghraib abuses, are a lack of political will or recognition of the complexity in proving support of the DoD from another USG agency.

The concept of support for DoD is pertinent to the Military Extraterritorial Jurisdiction Act (MEJA). Signed in November of 2000, the MEJA stated that DoD civilians, DoD contractors (and all sub-contractors) and their dependents (to include active duty dependents) accompanying the armed forces are subject to federal jurisdiction at all times over offenses committed outside the United States that would constitute felony level punishment. It also requires that any non-U.S. national (not from the HN) acting as a DoD civilian or contractor be notified, to the maximum extent practical, of the potential for subjection to the MEJA. An important following paragraph however offers that failure to provide notice does not, “defeat the jurisdiction of a court” or “provide a defense.” An additional application allows for prosecution of a military member who was found to have committed an act and has subsequently left the service and no longer falls under UCMJ jurisdiction.¹⁴ This act helped to close the loophole for contractors and others who previously were not covered under UCMJ jurisdiction.¹⁵

What was missing from the act was application to other USG agencies for their work outside the borders of U.S. territory. As media reporting of the Abu Ghraib prisoner abuse focused on contractor misconduct, it was determined that some of the contractors were hired through the Central Intelligence Agency and the U.S. Department of Interior.¹⁶ MEJA jurisdiction no longer had application and a new loophole was exposed. Congress’ attempt to expand the act fell short of what was required. The October 2004 signing of the fiscal year 2005 National Defense Authorization Act (NDAA) passed a measure that modified MEJA by

adding jurisdiction over “any other federal agency, or provisional authority, to the extent such employment relates to supporting the mission of the DoD overseas.”¹⁷ The language of the expansion is too vague and leaves unrestrained the maneuvering room a defense attorney or a higher court might use to interpret “supporting the DoD mission.”¹⁸ This renders the expansion largely ineffective.

Similar to SMTJ, only one federal case involving a contractor has been successfully prosecuted under the jurisdiction of MEJA.¹⁹ This prosecution involved a contractor found to have child pornography on his computer within the Abu Ghraib detention facility.²⁰ A stable environment for items such as secure access, witness interviews and forensics investigation is required for federal officials. However a PSC quite often operates in a non-permissive environment. There are logistical challenges to the investigative process in an area potentially thousands of miles away from U.S. borders and a potential dearth of proficiency with respect to military law by federal prosecutors.²¹ This fact was demonstrated as FBI investigators returned to Iraq after five months for further witness interviews and other events related to the Nisoor Square shooting, allegedly interviewing some witnesses for the first time.²² Outside of the contractor focus there are more applications of MEJA across the DoD however transparency is difficult. Few sources point to an accurate number of ongoing MEJA cases.²³ The bottom line is MEJA application is being done but rarely in the environment of a contingency operation such as Iraq or Afghanistan. Although the military criminal process is arguably better equipped to operate in a combat environment, federal jurisdiction is the second option the JFC must default to before turning to military channels.²⁴

Five words of the 2007 John Warner NDAA altered the UCMJ under title 10 of the United States Code by deleting the word “war” and replacing it with “declared war or a

contingency operation.”²⁵ The change in language referred to how jurisdiction of the UCMJ applied to civilians “serving with or accompanying an armed force in the field.” This small grammatical adjustment was a significant change in the capability of the JFC to hold any civilian serving abroad with the military, accountable for their actions under the applicable portions of the UCMJ, regardless of nationality excluding the HN.

With the title 10 modification, this new tool was added, albeit quietly. There was no issued guidance or corresponding case law that accompanied the change with the 2007 legislation. Almost a year after the change but only nine days after the Blackwater incident, Deputy Secretary of Defense England distributed a short memorandum summarizing the authority of the geographic combatant commander and the UCMJ jurisdiction over DoD contractors. This guidance lacked the specificity to affect application of the new measure. A more expansive memorandum was disseminated 10 March 2008, this time signed by Secretary of Defense Gates. After the legal vetting of the policy by the Secretary of Defense’s General Counsel, the more detailed text acted as the green light for the JFC.²⁶ Multinational Corps-Iraq (MNC-I) published a fragmentary order (FRAGO 257) 29 March 2008 for the purpose of informing commanders of the procedures now in place to handle UCMJ authority over appropriate DoD civilians in theater.²⁷ In less than a week the first media accounts appeared of a Canadian DoD contractor charged under U.S. military law.²⁸ This will most likely serve as the test case for the basis of this new judicial authority.

As the contract is the principal legal basis for the relationship between the commander and contractor, four remedies under Federal Acquisition Regulations (FAR) can be used to address misconduct or poor performance: documentation of adverse past performance (FAR 42.1501), stop work orders (FAR 42.1303), suspension of work (FAR

42.1302) and termination for default (FAR 49.4). This can only be done by a USG contracting officer authorized to enter into, administer and terminate contracts. With respect to billion dollar security contracts in Iraq alone, all of these steps represent significant monetary penalties and demonstrate a gap in the formal process of disciplinary measures. The largest of steps is working to place a company or individual on the Government Services Association Excluded Parties List System which prevents them from attaining future federal contracts. Currently a commander desiring steps less than those mentioned is limited to negotiating for items such as payment of condolence, restitution or other forms of monetary or procedural assessment. There is potential to structure these types of fines within a contract and to have bonds held in order to ensure their issue, however these are not consistent procedures nor doctrinal solutions.

In between doing nothing and enforcing an acquisition regulation there is a measure of influence the commander can apply to ensure contractors are in compliance with the command objectives. Clauses are often placed in the terms of contracts that allow the contracting officer or their representative (COR) to request the removal of an “employee whose conduct endangers persons or property, whose continued presence is inconsistent with the interest of military security, or who does not comply with all guidance, instructions, and general orders” consistent with command goals.²⁹ Other actions can help to indirectly enforce discipline; commanders can revoke or suspend access to or from an installation, weapon carrying privileges, letters of agreement, ID cards, and/or security clearances.³⁰ An additional device is the ability to influence a future contract. The contractor’s value of future employment will usually ensure compliance with requests made by the commander.

RECOMMENDATION

Even with all these tools available to the JFC, he is still unable to ensure control of his battlespace with respect to PSCs. There are three major areas of concern that are left uncovered. First, there is still no completely effective judicial tool covering non-DoD contractors. If a DoS contractor committed a crime within the JFC's battlespace there is potential for argument of no federal or UCMJ coverage. Second, coordination efforts between DoD and other USG or private agencies with respect to PSCs adds friction to the battlespace in an already complex environment. Third, lack of visibility on sub-contracted PSCs as well as those hired by other country or private/commercial entities can further cloud the environment. By unifying all PSC contracts under the DoD in the area of a contingency operation, the JFC will ensure federal or military jurisdiction, alleviate difficulties pertaining to multi-agency standards and procedures, and simplify the environment thereby improving reaction to the unexpected. The JFC should go a step further and require all security contracts to stay at the primary level with DoD vice allowing them to be sub-contracted by a requiring activity.

Maintaining the option of federal or military jurisdiction is essential for the JFC. Contractor accountability cannot rely on untested UCMJ application alone. Although legally vetted by military counsel there are more case histories falling against military jurisdiction over civilians than the reverse. The Supreme Court has ruled that military dependents accompanying their spouse overseas do not fall under military jurisdiction.³¹ However depending on the equivalency of a contingency operation versus a declared war status, certain cases where civilians have been tried under the UCMJ, including a merchant seaman for desertion, may lend support.³² One core of the issue is that UCMJ application to civilians

in a contingency operation could find itself on the wrong side of a decision in the near future, thus removing the JFCs ability to account for non-DoD contractors. By aligning PSCs under DoD the court-tested MEJA application would still apply. Additionally, the structure provides a clearer picture if the argument is raised that a non-DoD contractor attempts to dispute his status of “accompanying the force.”

Coordination between the military and any other USG agencies employing contractors in the joint environment is a necessity. Until recently, coordination between DoS contractors and military forces in Iraq was minimal. Even DoD evaluation of its awareness of its own PSCs was lacking as was PSC awareness of the battlespace, prior to the September incident.³³ Reports of blue-on-white shootings, between contractor and military, were commonplace as was the negative impact of other PSC actions.³⁴ In response to the Nisoor Square shooting, a memorandum of agreement between DoS and DoD forced the issue and attempted to synchronize the efforts of the two departments in theater.³⁵ Improvements have been made under new coordination efforts however there will always exist friction when multiple departments are involved. If the need for coordination can be removed by aligning all PSCs under one department, efficiency and effectiveness can be enhanced.

While coordination has improved there still exists redundant capabilities in country as well as differing operating procedures. DoS structure for PSC oversight begins with a Regional Security Office tactical operations center (RSO TOC). This further has operation centers located coincident with its five regional embassy offices (REO). In similar fashion military oversight starts with the MNC-I contractor operations cell (CONOC) in the joint operations center (JOC). Under this cell are five regional CONOCs. Currently only horizontal coordination is done between the higher level operations centers to include an

exchange of liaison officers (LNO). Why the duplicative structure? With PSC alignment under DoD, DoS security personnel could integrate into the military's operating structure and reallocate their resources for other pressing requirements.

While horizontal coordination does facilitate intelligence sharing and blue force awareness there are still DoS elements that can override the commander's threat level assessment and proceed to their desired objective. MNC-I can only make recommendations to the RSO TOC on Tier I contractor movements, those protecting the embassy and their details, versus DoD PSCs which can be canceled or redirected by the MNC-I CONOC.³⁶ Furthermore, despite the two parallel structures there are certain aspects or requirements that are resident from predominantly the military side of the house. A QRF or medical evacuation (MEDEVAC) is primarily coming in the form of a military response. Integration of DoS personnel into the existing military operation centers serves to reduce response layers and more importantly response time for both capabilities.

Standardization under DoD also provides a reduction in inconsistencies between the two departments' procedures and policies. Prior to contract execution there will be matters involving items such as equivalence of training requirements, weaponry allowed, rules of engagement or use of force, and security clearance requirements. Execution produces other integration issues: escalation procedures, graduated force response, quick reaction forces, communication interoperability and domain awareness. After action questions of reporting format and channels along with investigation responsibility and protocol round out only a partial look into requirements of standardization. The Nisoor Square shooting has demonstrated the negative effects that can be felt from a building series of events along the

seams of policy and procedure. Simplicity helps prevent inconsistencies from aligning to create larger problems for the JFC.

Shifting responsibility of the PSCs from DoS to DoD also serves to increase the amount of resources available for management and oversight without altering the end product for the DoS requiring activity. The diplomatic security (DS) corps, numbering approximately 1450 personnel, has been charged with the brunt of tactical oversight of DoS PSCs. They serve as agents-in-charge often with two assigned to each detail. There are others that are assigned as program managers, CORs and as assistant regional security officers. The over tasking of the DS community is recognized and DoS has moved to increase the DS ranks by 200 personnel and increase funding by \$200 million based on FY2009 budget inputs.³⁷

The DoD has been increasing its contract oversight capability specifically with respect to Iraq and Afghanistan and there is even more focus with regard to PSCs. Joint Contracting Command – Iraq (JCC-I) stood up in January of 2005. There are over two hundred personnel in the command with a recent addition of 39 responding to increased mission requirements with regard to PSCs.³⁸ JCC-I handles almost 100 percent of the pre-award administration of DoD contracts in Iraq ensuring MNF-I guidance is incorporated and standardized.³⁹ Even larger is the role the Defense Contract Management Agency (DCMA) plays in their handling of all post-award contract management, quality assurance and oversight. Their recent addition of 100 personnel to the Iraq and Afghanistan theater in conjunction with a planned increase of 150 more during spring of 2008 vastly improves their capability.⁴⁰ The Army's Contracting Command, activated 13 March 2008, is an attempt to facilitate the expansion of current expeditionary contract capability. Integral to operational

contracting in almost any foreseeable contingency, the Army has put in motion the stand up of contracting support brigades. The timeline for full operational capability of the command is three years with initial capability in the fall of 2008.⁴¹

Within DoD the requiring activity provides the COR to act as the on sight representative of the contracting officer ensuring contract compliance. This overall DoD structure would allow for a DS agent to operate as a COR at the security detail level but then integrate within the DoD structure for administration and oversight under JCC and DCMA. This enables the customer, in this case DoS, the ability to evaluate and ensure he is receiving what his contract requires even though under DoD. Any stringency required for higher Tier I level contracts could be incorporated into the contract language. There is also an opportunity for reallocation of effort on the part of DS personnel who are already stretched thin by manpower requirements. Equally important, it provides a means for accountability being structured through DoD and under MEJA and UCMJ application.

Looking past the potential benefits of this type of structuring, DoS may feel there are some heavier issues that outweigh the value added. There is potentially a loss of control, a decreased ability to provide security for its personnel, or a loss of vital funding from core DoS budgeting. Having addressed the first two concerns above, the funding discussion requires a closer look at monetary sources. In fiscal year 2007 DoS worldwide protective services received an additional \$96.5 million and in 2008 they are slated to receive \$206.6 million more, both via supplemental funding bills.⁴² The temporary nature of the supplemental funds is a more manageable framework within which to shift funding if required and does not threaten to remove core funding from one department to another. Moreover, the fiscal environment of the government amidst the war on terror combined with

operations in Iraq and Afghanistan, DoD and DoS cannot be reliant on continuing supplemental funds for core mission areas.

Even implementing the changes proposed in this paper the JFC will be unable to completely control PSCs within his battlespace. Using Iraq as an example, multiple PSC contracts are issued by the Government of Iraq (GoI), state and international commercial businesses, non-government organizations (NGO) along with undocumented private usage. The goal of the JFC is to have control of his own PSCs but also maintain awareness of and potentially influence others within his area of operations. By simplifying the JFCs internal structure by eliminating systemic variables, he improves his ability to handle variables he is less able to predict.

Within DoD sub-contracting of security decreases the ability of oversight and management of the contractor. The Army Corps of Engineers, Gulf Region Division (GRD) is one of the largest users of private contracts. When contracting for logistics it is acceptable for security of the contractor to be written into the contract as the responsibility of the contractor and they are paid accordingly. The company then turns and sub-contracts for its security requirements. While the security sub-contractor is still responsible for complying with DoD requirements the primary contractor is answerable for the sub-contracted firm. The concept of “privity of contract” can also lead to difficulty since there is no legal contract between the USG and the sub-contractor. By removing the security requirement from the sub-contractual level and ensuring PSCs are administered as primary contracts only, awareness and supervision are enhanced for the JFC.

Commercial entities hiring of PSCs is an unavoidable circumstance within an unstable operational environment. For example, an international media organization could

hire a PSC assuming they complied with any and all HN requirements. This PSC contract would no longer have to comply with DoD or other USG rules and regulations while operating. However there are again influences that are available to the JFC. A large portion of PSCs that would be hired for such a contract also have contracts with both DoD or DoS. A contractor's behavior in theater while under the employ of a commercial firm can still affect the JFC's environment. The contractor's understanding of the risk to future business as well as the JFC's ability to respond with a QRF can help to ensure disciplined contractor performance.

CONCLUDING REMARKS

Organizational behavior stands in the way of these changes in two additional ways. DoD may not desire to shoulder the additional burden of DoS security contractors. There is also a tendency for an organization to define away more difficult problems. The military finds comfort in tackling phase III decisive combat but increasingly finds itself required to focus more on the other five phases of military operations, most recently the stability and reconstruction of phase IV. DoD Directive 3000.05 states that stability operations, where contractor use is so prevalent, are a core military mission with "priority comparable to combat operations."⁴³ Seeing past these organizational challenges will allow for an efficient and effective resolution to the difficulties brought on by the use of PSCs.

Contractors have faced an extremely challenging environment where conservative Department of Labor statistics place over 900 killed and 12,000 wounded during the first four years of the Iraq operation.⁴⁴ And little uncertainty should exist that PSC performance in the face of this harsh environment has largely been professional and disciplined. Blackwater personnel were recently awarded medals of valor by Polish officials, something

not done for foreigners since World War II, for rescuing their embassy personnel from an assault on its motorcade.⁴⁵ The January 2008 ceremony was attended by General Petraeus and Ambassador Crocker, a public show of support for the embattled company.

Regardless of opinion, PSCs are currently required. In an environment such as Iraq, the DoS does not have enough DS personnel in its entire cadre to equal the number of security contractors it currently employs. The DoD even estimated a plus up of manpower on the order of nine additional combat brigades to assume all security functions within Iraq.⁴⁶ Even more pressing in regard to the requirement, when an incident of contractor wrongdoing arises the JFC needs a policy and process to hold them accountable in an expeditious manner. The Nisoor Square shooting is still under investigation by the FBI, seven months after the incident, with no official clarification of the events that transpired or the jurisdiction of those involved. The strategic effects of a perceived injustice, appropriate or not, would have been minimized by a more swift investigation with clearer lines of accountability.

There will undoubtedly be a continuing and appropriate debate about the level of contractor usage and what functions are inherently governmental.⁴⁷ Currently there exists legislation that ranges from banishing PSC use in Iraq to MEJA expansion covering all USG agencies.⁴⁸ These topics are required to confront the present and future operational environment with respect to contractor employment. Current accountability issues for PSCs needs to be resolved now using existing legal channels rather than wait on future legislation to rectify the problem.

In 2007, Colonel Peter Mansoor, General Petraeus' executive officer, told Jane's Defense Weekly that "I would much rather see basically all armed entities in a counter-insurgency operation fall under a military chain-of-command."⁴⁹ This comment lays bare the

importance of the hearts and minds struggle in the type of conflict our transformational military increasingly faces. The focus on the strategic corporal can very quickly become a discussion of the strategic contractor as the events of 16 September 2007 can attest. Incorporation of PSCs under DoD is the right choice to provide the JFC, under current statute and policy, with the operational capability to effectively control PSCs.

¹ Steven Fainuru and Sudarsan Raghavan, "Blackwater Faced Bedlam, Embassy Report Finds," *Washington Post*, 28 September 2007, page A01.

² Fainuru and Raghavan, "Blackwater Faced Bedlam, Embassy Report Finds," page A01.

³ Tyler Cowen, "To Know Contractors, Know Government," *New York Times*, 28 October 2007, <http://www.nytimes.com/2007/10/28/business/28view.html?ex=1351224000&en=54f273e5beefca57&ei=5090&partner=rssuserland&emc=rss> (accessed 4 April 2008).

⁴ Ken Silverstein, *Private Warriors* (London: Verso 2002), 144.

⁵ David Isenberg, *A Government in Search of Cover*, British American Security Information Council online study, <http://www.basicint.org/pubs/Papers/pmcs0603.htm>, (accessed 9 April 2008).

⁶ Deborah Avant, "The Privatization of Security and Change in the Control of Force," *International Studies Perspectives*, Vol. 5, Issue 2, (May 2004): 153-157

⁷ Jack Bell, "Testimony," Senate, *Management and Oversight of Contingency Contracting in Hostile Zones*, 110th Cong., 2nd sess., 2008, 1

⁸ Different sources offer estimates anywhere from 25,000 to 70,000 PSCs. Human Rights First provides a summary of estimates in its report *Private Security Contractors at War* accessible at www.humanrightsfirst.org.

⁹ Chairman, U.S. Joint Chiefs of Staff, *DoD Dictionary of Military and Associated Terms*, Joint Publication 1-02 (Washington, DC: CJCS, 8 March 2008), 120

¹⁰ Human Rights Watch and the International Committee of the Red Cross have a wide range of publications representing a representative summary of international opinion.

¹¹ The War Crimes Act of 1996, 18 USC § 2441, which allows for prosecution of a U.S. national for any violation of Common Article Three of the four Geneva Conventions, has yet to be used by the U.S. government against anyone.

¹² Common misconception is that the Coalition Provisional Authority (CPA) in Iraq gave full immunity from Iraqi law to private security contractors. CPA order 17 stated "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto". This left open the possibility that contractors could fall under Iraqi law for committing criminal offenses unrelated to their work.

¹³ John White and Dafna Linzer, "Ex-Contractor Guilty of Assaulting Detainee," *Washington Post*, 18 August 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/17/AR2006081700163.html>, (accessed 20 April 2008).

¹⁴ *US v. Nazario* ED CR 07-127 SGL or *US v. Green*, W. Dist KY are recent examples of former military members facing prosecution.

¹⁵ The Vietnam timeframe saw several military appeals court cases that overturned UCMJ convictions against civilian contractors citing the lack of a formal declaration of war. MEJA addresses this loophole. See *United States v. Averette*, 41 U.S.C.M.A. 363 (1970) and *Zamora v. Woodson*, 19 U.S.C.M.A. 403 (1970).

¹⁶ Renae Merle and Ellen McCarthy, "6 Employees from CACI International, Titan Referred for Prosecution", *Washington Post*, 26 August 2004, A18, <http://www.washingtonpost.com/ac2/wp-dyn/A33834-2004Aug25?language=printer>, (accessed 9 April 2008).

¹⁷ Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, 108th Cong., 28 October 2004.

¹⁸ Glenn R. Schmitt, "Amending the MEJA of 2000: rushing to close an unforeseen loophole," *Army Lawyer*, June 2005, 41, http://www.loc.gov/rr/frd/Military_Law/AL-2005.html, (accessed 29 February 2008).

¹⁹ There is one case pending under MEJA jurisdiction against a contractor for a violent offense (assault) for an alleged stabbing. See Associated Press, "Military Contractor Charged with Assault for Stabbing in Iraq," *ktar.com*, 1 March 2007, <http://news.ktar.com/?nid=6&sid=401711>, (accessed 20 April 2008).

²⁰ *US v. Khan*, E.D. VA, Criminal No. 1:07CR35-CMH

²¹ Scott Horton, "Can't Win With 'Em, Can't Go to War Without 'Em': Six Questions for P.W. Singer," *Harper's Magazine*, 30 September 2007, <http://harpers.org/archive/2007/09/hbc-90001311>, (accessed 10 April 2008).

²² Matt Apuzzo and Lara J. Jordon, "Blackwater inquiry turns to Baghdad," *Associated Press*, 21 February 2008, <http://www.politicalposts.com/news/frameset.asp?vars=jumpto.asp?id=342664>, (accessed 5 March 2008).

²³ The author's inquiry with DoJ officials was met with a negative response. Some estimates place the number at 60 pending MEJA cases. See David Isenberg, "Dogs of War: More oversight needed," *United Press International*, 8 February 2008,

http://www.upi.com/International_Security/Emerging_Threats/Analysis/2008/02/08/dogs_of_war_more_oversight_needed/9895/, (accessed 5 March 2008).

²⁴ Initial investigation and process may fall on military assets by request of the DoJ even if federal prosecution is the expected approach. The subject is covered in the Defense Secretary's 10 March 2008 memorandum and in Department of Defense. *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the US, Certain Service Members, and Former Service Members*. DoD Instruction 5525.11. (Washington, DC: DoD, 3 March 2005)

²⁵ The modification was introduced by Sen. Lindsey Graham (R-S.C.) a USAF reserve Judge Advocate General.

²⁶ As early as 26 July, 2007 Associate Deputy General Counsel Reed from DoD briefed the National Contract Management Association's 45th aerospace and defense conference on the majority of the substance later issued in the Defense Secretary's 10 March 2008 memorandum. See Robert Reed, "Contingency Rules: The Application of the UCMJ to Contractors," Powerpoint, 26 July 2007, Garden Grove, California, Previously accessed at www.ncma.org, now invalid. Hard copy on file with author. Similar presentation can be found at <http://www.militarylawsection.com/documents/UCMJJurisdiction.ppt#256,1,Developments%20in%20UCMJ%20Jurisdiction>

²⁷ MNC-I FRAGO 257, 29 March 2008

²⁸ Michael R. Gordon, "U.S. Charges Contractor at Iraq Post in Stabbing," *New York Times*, 5 Apr 2008, <http://www.nytimes.com/2008/04/05/world/middleeast/05trial.html>, (accessed 5 Apr 2008).

²⁹ Public Law 108-375, section 1206 report

³⁰ Public Law 108-375, section 1206 report

³¹ *Reid v. Covert*, 354 US 1 (1957), *McElroy v. Guagliardo*, 361 US 281 (1960), *Kinsella v. Singleton*, 361 US 234 (1960), *Grisham v. Hagan*, 361 US 278 (1960)

³² *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va 1943), *In re diBartolo*, 50 F. Supp. 929, (S.D.N.Y 1943), *Perlstein v United States*, 151 F.2d 167 (3rd Cir. 1945)

³³ Mike Player, "Welcome Government Accounting Office," Powerpoint, 22 February 2008, Contractor Procedures Oversight Division, MNF-I, 13

³⁴ Ann Mulrine, "Private Security Contractors Face Incoming Political Fire; US soldiers, too, raise objections to Blackwater's behavior," *US News & World Report*, 15 October 2007, 36, <http://www.proquest.com/> (accessed 5 March 2008)

³⁵ Deputy Secretary of Defense and Deputy Secretary of State, memorandum of agreement, 5 December 2007.

³⁶ MNF-I FRAGO 07-428 mod 2, (Armed Contractors/DOD Civilians and PSCs) section 3.C.3.E/F, February 2008

³⁷ U.S. Department of State, *The Budget in Brief FY2009*, U.S. Government Report, (Washington, DC: Department of State, 4 February 2008), 31

³⁸ Mike Player, "Welcome Government Accounting Office," Powerpoint, 22 February 2008, Contractor Procedures Oversight Division, MNF-I, 15

³⁹ Player, "Welcome Government Accounting Office," 15

⁴⁰ Mark Woodbury, "Gates Mandates Agency Oversee all Contingency Contract Operations," *Communicator*, Winter 2007, 6, <http://www.dcmil.com/communicator/winter07/contents.htm>, (accessed 6 April 2008).

⁴¹ Senate Armed Services Subcommittee on Readiness and Management Support. Hearing on Department of Defense Contracting in Iraq and Afghanistan. *Congressional Transcripts*. 2 April 2008, 10-11

⁴² U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110-28); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Public Law 110-161, Division J).

⁴³ U.S. Department of Defense, *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*, Department of Defense Directive 3000.05 (Washington, DC: DoD, 28 November 2005), 2

⁴⁴ John M. Broder, "Contractor Deaths in Iraq Soar to Record", *New York Times*, 18 May 2007, <http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html?ex=1337227200&en=06714ffa2ba414b9&ei=5088&partner=rssnyt&emc=rss>, (accessed 12 Apr 2008). Article obtained casualty data through freedom of information act with the Department of Labor.

⁴⁵ "To the Rescue, Embassy's Contract Security Staff Save Polish Ambassador," *State Magazine*, April 2008, 5

⁴⁶ Jackson Bell, Senate Armed Services Subcommittee on Readiness and Management Support. Hearing on Department of Defense Contracting in Iraq and Afghanistan. *Congressional Transcripts*. 2 April 2008, 12

⁴⁷ U.S. Department of Defense, *Guidance for Determining Workforce Mix*, Department of Defense Instruction 1100.22, (Washington, DC: DoD, 6 April 2007). Provides guidance on what functions, considered inherently governmental, cannot be privately contracted.

⁴⁸ Senate, *Stop Outsourcing Security Act*, 110th Cong., 1st sess., 2007, S 2398; House, *MEJA Expansion and Enforcement Act of 2007*, 110th Cong., 1st sess., H.R. 2740

⁴⁹ Nathan Hodge, "Contractors may face greater US military control," *Jane's Defence Industry*, (1 February 2007), 2, <http://www8.janes.com/> (accessed 14 April 2008).

BIBLIOGRAPHY

18 USC § 3261 (2000)

18 USC § 7(9)(a) (2001)

Apuzzo, Matt and Lara J. Jordon. "Blackwater inquiry turns to Baghdad." *Associated Press*. 21 February 2008.
<http://www.politicalposts.com/news/frameset.asp?vars=jumpto.asp?id=342664>.
(accessed 5 March 2008).

Avant, Deborah. "The Privatization of Security and Change in the Control of Force." *International Studies Perspectives*. Vol. 5. Issue 2. (May 2004)

Associated Press. "Military Contractor Charged with Assault for Stabbing in Iraq." *ktar.com*. 1 March 2007. <http://news.ktar.com/?nid=6&sid=401711>. (accessed 20 March 2008).

Bell, Jack. "Testimony," Senate. *Management and Oversight of Contingency Contracting in Hostile Zones*. 110th Cong., 2nd sess., 2008.

Broder, John M. "Contractor Deaths in Iraq Soar to Record." *New York Times*. 18 May 2007.
<http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html?ex=1337227200&en=06714ffa2ba414b9&ei=5088&partner=rssnyt&emc=rss>. (accessed 12 Apr 2008).

Brodsky, Robert. "After Blackwater." *Government Executive* 39, No. 21 (December 2007). 9-11. <http://www.proquest.com/> (accessed 5 March 2008)

Coalition Provisional Authority. Memorandum Number 17. 26 June 2004

Congressional Majority Staff. To Members of the Committee on Oversight and Government Reform. Memorandum, 1 October 2007.

Cowen, Tyler, "To Know Contractors, Know Government", *New York Times*, 28 October 2007,
<http://www.nytimes.com/2007/10/28/business/28view.html?ex=1351224000&en=54f273e5beefca57&ei=5090&partner=rssuserland&emc=rss> (accessed 4 April 2008).

Deputy Secretary of Defense and Deputy Secretary of State. Memorandum of agreement. 5 December 2007.

Deputy Secretary of Defense. To Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands, General Counsel of the DoD, Inspector General of the

- DoD, Assistant to the Secretary of Defense, Director Administration and Management, Director Program Analysis and Evaluation, Directors of the Defense Agencies, Directors of the DoD Field Activities. Memorandum. 25 September 2007.
- Dickenson, Laura A. "Accountability of Private Security Contractors under International and Domestic Law." *American Society of International Law* 11, No. 31. 26 December 2007
- Elsea, Jennifer K. and Nina M. Serafino, , *CRS Report for Congress: Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*. Congressional Research Service. 11 July 2007.
- Fainuru, Steven and Sudarsan Raghavan, "Blackwater Faced Bedlam, Embassy Report Finds", *Washington Post*, 28 September 2007, page A01.
- Gordon, Michael R. "U.S. Charges Contractor at Iraq Post in Stabbing." *New York Times*. 5 Apr 2008. <http://www.nytimes.com/2008/04/05/world/middleeast/05trial.html>. (accessed 5 Apr 2008).
- Grisham v. Hagan*, 361 US 278 (1960)
- Hodge, Nathan. "Contractors may face greater US military control." *Jane's Defence Industry*. (1 February 2007). <http://www8.janes.com/>. (accessed 14 April 2008).
- Horton, Scott. "Can't Win With 'Em, Can't Go to War Without 'Em': Six Questions for P.W. Singer." *Harper's Magazine*. 30 September 2007. <http://harpers.org/archive/2007/09/hbc-90001311>. (accessed 10 April 2008).
- House, *MEJA Expansion and Enforcement Act of 2007*, 110th Cong., 1st sess., H.R. 2740
- In re diBartolo*, 50 F. Supp. 929, (S.D.N.Y 1943)
- Isenberg, David. *A Government in Search of Cover*. British American Security Information Council online study. <http://www.basicint.org/pubs/Papers/pmcs0603.htm>. (accessed 9 April 2008).
- Isenberg, David. "Dogs of War: More oversight needed." *United Press International*. 8 February 2008. http://www.upi.com/International_Security/Emerging_Threats/Analysis/2008/02/08/dogs_of_war_more_oversight_needed/9895/. (accessed 5 March 2008).
- Kinsella v. Singleton*, 361 US 234 (1960)
- McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va 1943)

McElroy v. Guagliardo, 361 US 281 (1960)

McMahon, Lee and Gary Shefflick. "Gansler Commission Cites Systemic Problems in Army Contracting." *Army News Service*. 1 November 2007.
<http://www.army.mil/-news/2007/11/01/5906-gansler-commission-cites-systemic-problems-in-army-contracting/>. (accessed 4 April 2008).

Merle, Renae and Ellen McCarthy. "6 Employees from CACI International, Titan Referred for Prosecution." *Washington Post*. 26 August 2004. A18.
<http://www.washingtonpost.com/ac2/wp-dyn/A33834-2004Aug25?language=printer>, (accessed 9 April 2008).

Mulrine, Ann. "Private Security Contractors Face Incoming Political Fire; US soldiers, too, raise objections to Blackwater's behavior." *US News & World Report*. 15 October 2007. 36. <http://www.proquest.com/> (accessed 5 March 2008).

MNF-I FRAGO 07-428 mod 2, (Armed Contractors/DOD Civilians and PSCs) February 2008

U.S. Department of State, Office of the Spokesman. *Ambassador Patrick F. Kennedy on the Report of the Secretary of State's Panel on Personal Protective Services in Iraq*. Special Briefing. 23 October 2007

Perito, Robert. "Embedded Provincial Reconstruction Teams." United States Institute of Peace. March 2008.
http://www.usip.org/pubs/usipeace_briefings/2008/0305_prt.html. (accessed 7 March 2008).

Perlstein v United States, 151 F.2d 167 (3rd Cir. 1945)

Player, Mike. "Welcome Government Accounting Office." Powerpoint. 22 February 2008. Contractor Procedures Oversight Division. MNF-I.

Public Law 108-375, 108th Cong., section 1206 report

Reed, Robert. "Contingency Rules: The Application of the UCMJ to Contractors." Powerpoint. 26 July 2007. Garden Grove, California. Previously accessed at www.ncma.org, now invalid. Hard copy on file with author.

Reid v. Covert, 354 US 1 (1957)

Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, 108th Cong., 28 October 2004.

John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, 109th Cong., 17 October 2006

- Schmitt, Glenn R. "Amending the MEJA of 2000: rushing to close an unforeseen loophole." *Army Lawyer*. June 2005. 41.
http://www.loc.gov/rr/frd/Military_Law/AL-2005.html. (accessed 29 February 2008).
- Schmitt, Michael N. "Contractors on the Battlefield: The US Approach." *Militair Rechtelijk Tijdschrift (Journal of Military Justice)*. Netherlands Ministry of Defense. Jul-Aug 2007.
- Secretary of Defense. To Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands. Memorandum. 10 March 2008
- Senate Armed Services Subcommittee on Readiness and Management Support. Hearing on Department of Defense Contracting in Iraq and Afghanistan. *Congressional Transcripts*. 2 April 2008
- Senate, *Stop Outsourcing Security Act*, 110th Cong., 1st sess., 2007, S 2398
- Shane, Scott. "CIA Contractor Guilty in Beating of Afghan Who Later Died." *New York Times*. 18 Aug 2006.
<http://www.nytimes.com/2006/08/18/washington/18detain.html?ex=1313553600&en=7d7bd981725fca79&ei=5090&partner=rssuserland&emc=rss>, (accessed 10 April 2008).
- Silverstein, Ken. *Private Warriors*. London: Verso 2002.
- State Magazine. "To the Rescue, Embassy's Contract Security Staff Save Polish Ambassador." *State Magazine*. April 2008.
- United States v. Averette*, 41 U.S.C.M.A. 363 (1970)
- United States v. Khan* E.D. VA, Criminal No. 1:07CR35-CMH
- U.S. Congress. House. MEJA Expansion and Enforcement Act of 2007, *Congressional Record*, 110th Cong., 3 October 2007
- U.S. Department of Defense. *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the US, Certain Service Members, and Former Service Members*. DoD Instruction 5525.11. Washington, DC: DoD, 3 March 2005
- U.S. Department of Defense. *Guidance for Determining Workforce Mix*. Department of Defense Instruction 1100.22. Washington, DC: DoD. 6 April 2007.

- U.S. Department of Defense. *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*. Department of Defense Instruction 3020.41. Washington, DC: DoD. 3 October 2005.
- U.S. Department of Defense. *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*. Department of Defense Directive 3000.05. Washington, DC: DoD, 28 November 2005.
- U.S. Department of State. *The Budget in Brief FY2009*. U.S. Government Report. Washington, DC: Department of State. 4 February 2008.
- U.S. Department of State. *Report of the Secretary of State's Panel on Personal Protective Services in Iraq*. U.S. Government Report. Washington, DC: Department of State. October 2007.
- U.S. Government Accountability Office. *Military Operations: Implementation of Existing Guidance and Other Actions Needed to Improve DOD's Oversight and Management of Contractors in Future Operations*. U.S. Government Report. Washington, DC: Government Accountability Office. 24 January 2008
- U.S. Office of the Chairman of the Joint Chiefs of Staff. *DoD Dictionary of Military and Associated Terms*. Joint Publication 1-02. Washington, DC: CJCS, 8 March 2008
- U.S. Office of the Chairman of the Joint Chiefs of Staff. *Operational Contract Support Draft*. Joint Publication 4-10. Washington, DC: CJCS, 1 November 2007
- Woodbury, Mark. "Gates Mandates Agency Oversee all Contingency Contract Operations." *Communicator*. Winter 2007.
<http://www.dcms.mil/communicator/winter07/contents.htm>. (accessed 6 April 2008).
- Zamora v. Woodson*, 19 U.S.C.M.A. 403 (1970)